STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
JOHN GALLIN & SON, INC.	:	DETERMINATION DTA NO. 811229
for Revision of a Determination or for Refund of Sales and Use Taxes under Articles 28 and 29 of the Tax Law for the Period June 30, 1987 through September 30, 1990.	:	

Petitioner, John Gallin & Son, Inc., 40 Gold Street, New York, New York 10038, by its representative Gerard W. Cunningham, Esq., moved the Division of Tax Appeals for an order striking the Division of Taxation's affirmative defense that the petition was untimely filed. The motion papers are dated January 15, 1993.

On February 17, 1993, the Division of Taxation by William F. Collins, Esq. (James P. Connolly, Esq., of counsel) cross-moved to dismiss the petition on the ground the petition was not timely filed.

Based on the affidavit of Gerard W. Cunningham and motion papers attached thereto, the affidavit of James P. Connolly, the affidavit of John Skorenski and exhibit attached thereto, and the reply affidavit of Gerard W. Cunningham, the following order is rendered.

ISSUES

I. Whether petitioner's motion to strike the Division's affirmative defense concerning timeliness of the petition should be granted.

II. Whether the Division of Tax Appeals has jurisdiction to hear the merits of this case because petitioner did not file a petition within 90 days of "making" its request for discontinuance of the conciliation process pursuant to Tax Law § 170.3-a(b).

FINDINGS OF FACT

Petitioner, John Gallin & Son, Inc., filed an application, dated October 20, 1990, for a $25,000.00 refund for the period June 30, 1987 to September 30, 1990. The ground asserted for

the refund was that sales tax was improperly collected on the service of constructing flooring which was a component part of a capital improvement project.

Petitioner filed a second application, dated November 1, 1990, for an $8,500.00 refund for the period June 30, 1987 to September 30, 1990 with respect to sales tax paid on the service of supplying scaffolding which allegedly was a component part of the completion of a capital improvement project.

By letter dated June 14, 1991, the Division of Taxation ("Division") denied both refund claims on the ground that raised flooring and scaffolding did not qualify as capital improvements.

On July 5, 1991, petitioner requested a conciliation conference. On February 25, 1992, a conciliation conference was held.

By letter dated May 11, 1992, the conciliation conferee informed petitioner that after reviewing all the evidence submitted at the conference, he determined that the refund denial would be sustained. The conferee also stated that if petitioner did not execute, within 15 days, the consent forms attached to the letter, he was required by law to issue a Conciliation Order.

On May 22, 1992, petitioner sent to the conciliation conferee further documentary evidence for the conferee's review before issuing the Conciliation Order.

Thereafter, petitioner's counsel sent to the conciliation conferee a letter, dated June 8, 1992, stating the following:

> "Please be advised that our client wishes to withdraw its request for a Conciliation Conference at this time and proceed immediately to a formal hearing.
>
> "We will appreciate your complying with this request and arranging for an early hearing date."

The envelope in which the letter was mailed was postmarked June 9, 1992.

In response, the conciliation conferee sent to petitioner the following letter, dated June 16, 1992:

> "The Bureau of Conciliation and Mediation Services acknowledges receipt of your letter of June 8, 1992 which has been accepted as a request for discontinuance in the above referenced matter.

"Please take notice that pursuant to section 170.3-a of the Tax Law, if you wish to continue your appeal, you must file a petition for a hearing in the Division of Tax Appeals within ninety (90) days from the date that your request for discontinuance was filed. The petition forms must be sent to:

Division of Tax Appeals
Riverfront Professional Tower
500 Federal Street - 4th Floor
Troy, NY 12180-2894

"I have enclosed petition forms for your convenience."

Petitioner filed a petition, dated September 11, 1992, for review of the Division's refund denial. Petitioner sent the petition by certified mail. The receipt of such mailing was postmarked September 13, 1992, and the return receipt indicated delivery to the Division of Tax Appeals on September 16, 1992.

By letter dated October 1, 1992, Frank A. Landers of the Petition Intake, Review and Exception Unit of the Division of Tax Appeals informed petitioner that its petition was not timely filed. The letter contained the following statements:

"A review of the petition and your request of discontinuance which was furnished by the Bureau of Conciliation and Mediation Services reveals that the petition is untimely. The statutory authority for a discontinuance, section 170.3-a.(b), provides that a taxpayer shall have ninety days from the time a request of discontinuance is made to petition the Division of Tax Appeals for a hearing.

"While your request of discontinuance was made on June 8, 1992, the petition was not filed until September 13, 1992 or 97 days later. Unfortunately, since the petition was not filed within the 90-day period, your client is not entitled to a hearing.

"If you have any questions concerning this matter, please do not hesitate to contact me."

In response, petitioner sent a letter, dated October 8, 1992, to Mr. Landers disagreeing with his conclusion that petitioner was not entitled to a hearing. Petitioner argued that there is no evidence its letter dated June 8, 1992 was actually mailed out on that date and even if it had been mailed on June 8, it could not have been received on June 8; that the conferee did not indicate in his June 16, 1992 letter the date on which the request for a discontinuance was "accepted" or "filed" and, therefore, the only reasonable date upon which it could rely as the commencement date of the 90-day period was June 16, 1992. Petitioner further argued that

Mr. Landers' letter created additional confusion by stating that the 90-day period starts from the time a request for a discontinuance "is made", whereas nowhere in the conferee's June 16, 1992 letter did the conferee state when petitioner's request had been "made".

By letter dated November 3, 1992, Mr. Landers informed petitioner as follows:

> "In view of the substantial questions raised by you, the petition has been accepted for a hearing to determine if the Division of Tax Appeals has jurisdiction over the taxpayer.
>
> "If you have any questions concerning this matter, please feel free to contact me."

By letter dated November 12, 1992, Frank McMahon, also of the Petition Intake, Review and Exception Unit of the Division of Tax Appeals, informed petitioner as follows:

> "The Division of Tax Appeals acknowledges receipt of your petition . . . .
>
> "As this petition is deemed in proper form, it has been forwarded to the law bureau for preparation of the answer.
>
> "Any further questions you may have regarding the status of this appeal should refer to files reference number DTA 811229 and be directed to my attention."

The Division filed an answer, dated January 4, 1993, wherein it asserted as an affirmative defense that petitioner did not timely file its petition within 90 days of its discontinuance of the conciliation process.

Petitioner filed a motion, dated January 15, 1993, requesting the Division of Tax Appeals ("DTA") to issue an order striking the Division's affirmative defense that the petition was not timely filed.[1] In support of its motion, petitioner alleged as follows:

> "By the terms of the Division's letter dated November 12, 1992, the Petitioner was notified that its Petition was deemed proper. Based thereon, the Petitioner was lead [sic] to believe it was unnecessary [sic] to re-file an updated Petition with the Division. If the question of timeliness is allowed to be raised, again and decided in favor of the Division, the Petitioner will have forfeited a substantial period of time for which it could apply for a refund thereby denying the Petitioner its right to seek part of the requested Refund.
>
> "The attempt by the Division to re-assert the question of timeliness in its Answer to the Petition is in direct contradiction with the written decision of the Division as stated in its letter of November 12, 1992 and is improper."

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[1]Petitioner requested oral argument on the motion. This request is denied.

On February 17, 1993, the Division cross-moved to dismiss the petition on the ground it was untimely filed and, therefore, the DTA had no jurisdiction to hear the merits of the case. The Division asserted that the date commencing the 90-day period for filing a petition with the DTA was the

mailing date (June 9, 1992) of the June 8, 1992 letter requesting the discontinuance. In response to petitioner's motion to strike the Division's affirmative defense of timeliness, the Division argued that the November 12, 1992 letter was neither misleading nor did it result in any detriment to petitioner.

Petitioner responded to the Division's cross motion by reply affidavit of Gerard W. Cunningham, dated March 19, 1993. In that affidavit, Mr. Cunningham argued that petitioner's June 8, 1992 letter which requested the discontinuance also requested a formal hearing at an early hearing date. Mr. Cunningham asserted that the June 8 letter, therefore, should be sufficient to constitute a "petition for hearing". Mr. Cunningham also contended, in the alternative, that the conferee's June 16, 1992 letter advising petitioner of the conferee's acceptance of the discontinuance commenced the 90-day period for filing the petition and that, therefore, its mailing of the petition on September 13, 1992 was within the 90-day period. Mr. Cunningham further argued that the Division caused the confusion and ambiguity concerning the date which commenced the 90-day period and, therefore, it is justifiable to use the June 16, 1992 commencement date. With respect to petitioner's motion to strike, Mr. Cunningham states:

> "According to its letter dated November 3, 1992 . . . the taxpayer's petition herein 'has been accepted for a hearing to determine if the Division of Tax Appeals has jurisdiction . . . .'
> Mr. Connolly's affidavit fails to disclose the time, date and outcome of such hearing, which obviously resulted in a determination of jurisdiction."

CONCLUSIONS OF LAW

A. Petitioner's motion to strike the Division's affirmative defense with respect to the timeliness of the petition is denied. Petitioner's argument in support of the motion rests on the

notion that the DTA has already ruled in favor of petitioner on the timeliness issue (see, Findings of Fact "15" and "17"). As evidence of this favorable ruling, petitioner relies on Mr. McMahon's November 12, 1992 letter acknowledging receipt of the petition on behalf of the DTA. It is difficult to understand how an attorney can somehow construe the November 12 letter into a "written decision" that in some way would bar the Division from raising the timeliness issue in its answer. Clearly, Mr. McMahon's November 12 letter was a follow-up letter to Mr. Landers' November 3, 1992 letter which informed petitioner that his petition was accepted for the purpose of determining the DTA's jurisdiction. Mr. McMahon's letter further informed petitioner that the petition was deemed in proper form and was being forwarded to the Division for preparation of its answer (see, 20 NYCRR 3000.3[c]). Both Mr. Landers and Mr. McMahon identified themselves in their respective letters as individuals from the Petition Intake, Review and Exception Unit.

In his reply affidavit, Mr. Cunningham faults the Division's position in opposition to his motion to strike on the ground that the November 3 letter indicated the petition had been accepted for a hearing to determine if the DTA had jurisdiction and "Mr. Connolly's affidavit fails to disclose the time, date and outcome of such hearing, which obviously resulted in a determination of jurisdiction." Contrary to Mr. Cunningham's assertion, it was hardly "obvious" that a hearing had been held. No hearing was held or determination rendered and issued with respect to the jurisdictional question. The fact that petitioner did not attend a scheduled hearing or receive a determination on the jurisdictional question could not have gone unnoticed by petitioner's counsel. As noted in both Mr. Landers' and Mr. McMahon's letters, any questions petitioner had as to the status of the petition could have been directed to them. If petitioner's counsel had done so prior to filing the motion to strike, he would have been reassured that such hearing had not been held in his absence.

Finally, petitioner's claim of detrimental reliance on the November 12, 1992 letter makes no sense. Regardless of how petitioner's counsel construed the November 12, 1993 letter, his alleged misunderstanding would not have led to forfeiture of time to apply for a refund, or, in

any other way, impacted on whether petitioner had previously filed a timely petition.

B. In the alternative, petitioner's counsel argues that the June 8, 1992 letter to the conferee should have been sufficient to constitute a petition for a hearing with the Division of Taxation. Petitioner's counsel bases this argument on the fact that in the June 8 letter he stated that petitioner wanted to proceed immediately to a formal hearing and that he would appreciate the conferee "arranging for an early hearing date" (see, Finding of Fact "7").

Tax Law § 2000 provides that the administrative hearing process before the Division of Tax Appeals "is the process commenced by the filing of a petition." Tax Law § 2006.4 provides that a petitioner's request for a hearing is subject to "such rules, regulations, forms and instructions as the tribunal may prescribe . . . ." The regulations specifically prescribe the form and the information that should be contained in the petition (20 NYCRR 3000.3[a], [b]) as well as where the petition should be filed (20 NYCRR 3000.3[c]). None of these requirements had been met by the June 8 letter that was addressed to the conferee of the Bureau of Conciliation and Mediation Services. Although the Tax Appeals Tribunal has, in the interest of fairness, granted an informal request for a conference even though the request did not meet the formal requirements under the statute (see, Matter of Eastern Tier Carrier Corp., Tax Appeals Tribunal, December 6, 1990), the critical factors the Tribunal considered in reaching its result do not exist in this case. In Eastern Tier, the Tribunal held that based on an entire series of events the Division provided incorrect and unclear statements which led to the taxpayer's confusion. Here, any confusion by petitioner that the June 8 letter to the conferee constituted an adequate request for a hearing with the Division of Tax Appeals was clearly corrected by the conferee's June 16 letter. In that letter the conferee stated that if petitioner wished to continue its appeal, it "must file a petition for a hearing in the Division of Tax Appeals". The conferee further provided the address of the Division of Tax Appeals as well as petition forms for petitioner's "convenience". In sum, there is no merit to petitioner's claim that its June 8 letter was sufficient to constitute a petition for a hearing with the Division of Tax Appeals.

C. The Division now cross-moves pursuant to 20 NYCRR 3000.5(b)(1)(ii) for dismissal

of the petition on the ground that the DTA does not have jurisdiction because the petition was untimely filed. Therefore, the timeliness issue will be decided on the motion papers (20 NYCRR 3000.5[a][2]).

The denial of a refund shall be "final and irrevocable unless such applicant shall, within ninety days after the mailing of notice of such determination, petition the division of tax appeals for a hearing" (Tax Law § 1139[b]). The taxpayer has the option of protesting the denial by requesting a conciliation conference in lieu of filing a petition for a hearing before the DTA if the 90-day period to petition for the hearing has not elapsed (Tax Law § 170.3-a[a]; 20 NYCRR 4000.3[c]). A timely request for a conciliation conference suspends the running of the 90-day period for filing a petition for a hearing (Tax Law § 170.3-a[b]; 20 NYCRR 4000.3[c]). But, if the taxpayer requests discontinuance of the conciliation proceeding, the taxpayer must make the request for discontinuance in writing and then shall have 90 days from the date the request "is made", to petition the DTA for a hearing (Tax Law § 170.3-a[b]).

Petitioner asserts that the confusion and ambiguity concerning the commencement date of the 90-day period for filing the petition for hearing resulted from the conferee's letter which did not identify the date the request for discontinuance was "filed" or "accepted". Petitioner argues that the only reasonable date upon which it could rely as the commencement date of the 90-day period was July 16, 1992--the date of the conferee's letter acknowledging receipt of the request for a discontinuance.

There is no merit to petitioner's argument. In determining when a request for a discontinuance "is made", the regulations provide that the 90-day period commences from the time the request for discontinuance is "filed" (20 NYCRR 4000.6[b]).[2] The regulations further specify that the "filing" of requests with the Bureau of Conciliation and Mediation Services can

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[2]The same provision of the regulation provides that the receipt of a request for discontinuance "shall be acknowledged". Here, the conferee followed the regulation by acknowledging receipt of the request. Nowhere in this provision is the "acknowledgement" of the request confused with the filing date of the request itself. Clearly, the acknowledgement of the request and the filing of the request constitute two separate events that may occur on different dates.

be made either by delivery in person or by mail (20 NYCRR 4000.7[a][1][i]) and that, if such request is made by mail, the date of the United States postmark as stamped on the envelope in which the request is contained will be deemed the "date of service or filing" (20 NYCRR 4000.7[1][ii]). The conferee's July 16, 1992 letter to petitioner

acknowledging receipt of its request for discontinuance clearly stated that the 90-day period commenced from the date petitioner "filed" its request. The conferee never implied that the 90-day period would commence from the date of acknowledgement of the request. If petitioner's counsel was confused as to the "filing" date it was incumbent upon him to consult the statute the conferee cited Tax Law § 170.3-a and, if still confused, the regulations interpreting the statute.

Here, the Division demonstrated that the request for discontinuance was filed on June 9, 1992 as evidenced by the affidavit of John Skorenski and copy of the envelope containing the request for discontinuance, which is postmarked June 9, 1992. Petitioner filed its petition for hearing with the Division of Tax Appeals by certified mail, the receipt of which was postmarked September 13, 1992[3] -- 95 days after filing the request for discontinuance. Thus, the denial of the refund is final and irrevocable and the DTA does not have jurisdiction to review the petition (see, Tax Law § 2006.4; Matter of Davidson, Tax Appeals Tribunal, March 23, 1989).

D. Petitioner's motion to strike the Division of Taxation's affirmative defense concerning the timeliness of the petition to the Division of Tax Appeals is denied.

E. The Division of Taxation's cross motion to dismiss the petition on the ground the Division of Tax Appeals does not have jurisdiction over the merits of the petition is granted.

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[3]Under 20 NYCRR 3000.16(c)(2) the filing date of a petition sent by certified mail is the postmarked date stamped on the sender's certified receipt.

F. The petition of John Gallin & Son, Inc. is dismissed.

DATED: Troy, New York
April 15, 1993

/s/ Marilyn Mann Faulkner
ADMINISTRATIVE LAW JUDGE